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SUPREME COURT, U.S.
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No. 10-279

IN THE
Supreme Court of the United States

CARPENTER TECHNOLOGY CORPORATION,

Petitioners,

v.

AGERE SYSTEMS, INC., CYTEC INDUSTRIES, INC., FORD MOTOR COMPANY, SPS TECHNOLOGIES, LLC AND TI AUTOMOTIVE SYSTEMS LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions, properly presented, are:

1. Whether the Third Circuit erred in holding that when a party shoulders the costs of ongoing remediation work at a Superfund Site, and does so pursuant to a settlement agreement with other responsible parties, it "incurs" those costs and may therefore bring suit against other potentially responsible parties under § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9607(a)(4)(B), which authorizes a cause of action for recovery of the "costs of response incurred" by a private party, *id.*

2. Whether the Third Circuit abused its discretion in holding that, under the particular facts of this complex case, a remand was warranted to allow the district court to reconsider its equitable allocation of the cleanup costs among the responsible parties, reexamine the evidence already in the record, and reopen the record if appropriate.

RULE 29.6 STATEMENT

The parent corporation of respondent Agere Systems, Inc. is LSI Corporation, and the parent corporation of respondent SPS Technologies, LLC is Precision Castparts Corp. TI Group Automotive Systems, L.L.C. is wholly owned by respondent TI Automotive Systems LLC, which in turn is ultimately wholly owned by TI Automotive, Ltd., a private UK company. Neither respondent Cytec Industries Inc. nor respondent Ford Motor Company has any parent corporation.

No publicly held company owns 10% or more of the stock of any respondent.

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STATEMENT OF THE CASE

This complex CERCLA[1] case has been litigated for the last eight years and traces its origins to events occurring over three decades ago. And it has yet to be resolved: in the decision of which petitioner seeks this Court's review, the court of appeals remanded the case to the district court for further proceedings. The key facts are as follows.

1. Between 1972 and 1976, DeRewal Chemical Company, Inc. ("DCC") illegally dumped its customers' chemical waste in various sites in Pennsylvania. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 7a & n.1. One of those sites, in Bucks County, Pennsylvania, came to be known as the Boarhead Farms Superfund Site ("the Boarhead Site" or "the Site"). *Id.* at 6a.

Beginning in the early 1980s, the Environmental Protection Agency ("EPA") opened an investigation into the contamination at the Boarhead Site. *Id.* at 8a-9a. The EPA ultimately expended more than $14 million on those investigations, and on excavating buried drums and contaminated soils, constructing and operating a groundwater extraction and treatment system, and other initial cleanup actions. *Id.* at 74a. In its 1998 Record of Decision ("ROD"), EPA selected the permanent remedial technologies necessary to address the contamination at the Site. *Id.* at 9a.

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[1] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and the Superfund Amendments and Reauthorization Act of 1986, codified at 42 U.S.C. §§ 9601-9675 (collectively "CERCLA").

2. a. Respondents Cytec Industries Inc. ("Cytec"), Ford Motor Company ("Ford"), and SPS Technologies, LLC ("SPS") are companies who had some of their waste hauled by DCC in the 1970s. *Id.* at 14a. Because DCC improperly disposed respondents' waste at the Site, respondents became potentially responsible parties ("PRPs") for cleanup costs under CERCLA, which imposes strict liability for environmental contamination upon "any person who ... arranged with a transporter for transport for disposal ... of hazardous substances owned or possessed by such person," *id.* at § 9607(a)(3); *see also* Pet. App. 146a-147a.

On June 2, 2000, EPA sued Cytec, Ford, and SPS, pursuant to § 107(a)(4)(A) of CERCLA, 42 U.S.C. § 9607(a)(4)(A), which authorizes the United States to recover against PRPs "all costs of removal or remedial action incurred by the United States Government." Pet. App. at 20a. Cytec, Ford, and SPS simultaneously entered into a consent decree with EPA, in which they agreed to take over the operation and maintenance of the groundwater remediation system and perform other remedial actions required by the ROD, collectively the Operable Unit 1 ("OU-1") work. *Id.* at 10a.

Although respondents TI Automotive Systems, L.L.C. ("TI") and Agere Systems, Inc. ("Agere") had not been sued by EPA, *id.* at 14a, they recognized that their waste might have been dumped at the Site. Accordingly, they agreed, along with two other companies, to perform the OU-1 work collectively with SPS, Ford, and Cytec, and entered into private agreements to that effect. *Id.*; *see also id.* at 76a.

The seven companies then together hired contractors to perform the specific remediation tasks and established trust accounts into which they contributed funds and from which the contractors were paid. *Id.* at 76a.

b. In 2001, SPS, Ford, Cytec, and TI entered into a second consent decree with EPA, in which they agreed to implement the remaining ROD remedy components (collectively the Operable Unit 2, or "OU-2," work), and to compensate EPA more than $7 million for costs EPA had already incurred cleaning up the Site. *Id.* at 11a. Agere, without being sued by EPA or any PRP, entered into an agreement with the other respondents in which it agreed to perform and fund OU-2 work collectively with the other respondents, again through the establishment of common trust accounts, joint retention of contractors to do the work, and payment of those contractors from the common accounts. *Id.*; *see also id.* at 76a-77a.

3. Petitioner Carpenter Technology Corporation ("Carpenter") was also a customer of DCC in the 1970s and is responsible for almost one million gallons of highly acidic waste that DCC illegally dumped at the Boarhead Site. *Id.* at 16a. Indeed, Carpenter engaged DCC to haul away its "potent waste acids" despite knowing that DCC had a history of unlawful polluting practices. *Id.* at 16a-17a; *see also id.* at 127a, 153a.

Unlike respondents, however, Carpenter has yet to accept its responsibility. *Id.* at 17a, 127a-128a. In 2000, Carpenter received a notice letter from EPA asking it to resolve its potential liability to EPA and to agree to perform remediation work at the Site. *Id.*

at 12a. "Carpenter, however, rejected the entreaty." *Id.* at 154a; *see also id.* at 13a. It made no effort to resolve EPA's claims and, to date, has not paid a single penny toward respondents' costs of remediating the Site (or the more than $7 million that respondents SPS, Ford, Cytec, and TI paid to settle EPA's cost claims). *Id.* at 17a.

4. On June 18, 2002, respondents timely commenced this action against petitioner Carpenter and several other defendants, pursuant to CERCLA, in order to recover each defendant's equitable share of respondents' costs. *Id.* at 6a.[2]

a. CERCLA provides two separate causes of action to "allow private parties to recover expenses associated with cleaning up contaminated sites." *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007). On the one hand, § 113(f) provides a right of contribution, but only for equitable distribution of costs and, crucially, only after a party has been sued by the government or another PRP. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004). On the other hand, § 107(a)(4)(B) is available to private parties that have not been sued, and allows for joint-and-several liability, though it only allows parties to recover costs that they have themselves "incurred." *Atl. Research*, 551 U.S. at 137.[3]

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[2] Respondents also brought claims under a state-law statute that parallels CERCLA. *Id.* at 25a.

[3] As noted *supra*, § 107(a)(4)(A) grants the United States an identical cause of action to recover "all costs of removal or remedial action [it has] incurred ...." Section

Because Cytec, Ford, and SPS had previously been sued by EPA, and TI had been sued with respect to the OU-2 work, these respondents were able to bring reimbursement claims pursuant to § 113(f) of CERCLA (and TI was able to bring a § 113(f) claim with respect to the OU-2 work). And because their consent decree with EPA required them to incur cleanup costs on a going-forward basis, they also brought § 107(a) claims for cost recovery.

Agere had not been sued, however; it merely recognized that it might bear responsibility for cleanup costs at the Boarhead Site and therefore voluntarily came forward and agreed to shoulder the costs of remedial work on a going-forward basis. Pet. App. 76a. Similarly, TI had not been sued for the OU-1 work. *Id.* at 76a-77a. Lacking a § 113(f) claim, Agere instead brought only § 107(a) claims. And TI brought a § 107(a) claim limited to the costs of the OU-1 work.

In response to respondents' § 107(a) claims for joint-and-several liability, Carpenter counterclaimed under § 113(f) to seek an equitable distribution of costs among the PRPs. *See Atl. Research*, 551 U.S. at 140 (noting "a defendant PRP in ... a § 107(a) suit

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107(a)(4)(A) limits recoverable costs to those "not inconsistent with the national contingency plan." Similarly, § 107(a)(4)(B) limits recoverable costs to those "consistent with" the plan. In this case, the parties stipulated that "[t]he costs incurred by the OU-1 and OU-2 Groups were necessary to comply with the requirements of the ROD and were consistent with the National Contingency Plan." Pet. App. 133a.

could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim").

Carpenter also argued that none of the respondents could maintain § 107(a) claims. Carpenter pointed to language in *Atlantic Research* stating that "a PRP that pays money to satisfy a settlement agreement or a court judgment," but does not "itself incur[] clean-up costs," has a § 113(f) claim for contribution but not a § 107(a) claim for cost recovery. 551 U.S. at 139. According to Carpenter, this language in *Atlantic Research* precludes a party that shoulders the costs of cleanup pursuant to a consent decree with EPA or a voluntary settlement with other PRPs from ever asserting a § 107(a) claim.

b. When the bench trial began on June 23, 2008, all of the defendants had settled or had been granted unopposed motions to dismiss or unopposed motions for summary judgment—with the exception of Carpenter and Handy & Harman Tube Company, Inc. ("H&H"). Pet. App. 13a-14a & n.16.[4] These remaining parties stipulated to many, but not all, of the relevant facts. *Id.* at 132a-133a.

In light of Carpenter's § 113(f) contribution counterclaim, a key purpose of the bench trial was to determine how much of each party's waste was hauled by DCC to the Boarhead Site. The district court considered this and other evidence (including Carpenter's actual knowledge of DCC's history of pollution and Carpenter's refusal to cooperate with EPA) in order to "allocate response costs among liable parties

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[4] H&H was granted an unopposed motion to dismiss after trial. *Id.* at 14a.

using such equitable factors as the court determine[d] [were] appropriate," as required by CERCLA's contribution provision. 42 U.S.C. § 9613(f)(1); *see* Pet. App. 168a.

On the first day of trial, respondents entered into a stipulation (the "June 23 stipulation") with defendant H&H "as to the nature and volume of H&H waste disposed of at the Site and the volumes of waste[] of [respondents] that were hauled by DCC." *Id.* at 50a. Although Carpenter did not sign the June 23 stipulation, it did sign a July 1, 2008 stipulation with the respondents and H&H, which referenced the June 23 stipulation. Respondents took the position that by executing the July 1st stipulation, Carpenter had also joined the first one as well. *Id.* at 50a-51a. In any event, record evidence independently corroborated the volume amounts listed in the June 23 stipulation; for instance, respondents listed respective levels of waste in answers to pretrial interrogatories, and Carpenter itself introduced these answers into evidence. *Id.* at 56a. Respondents had also submitted into evidence exhibits—including invoices and purchase orders—that further corroborated the waste levels of various parties. *Id.* at 51a & n.35.

Following the bench trial, the district court ruled in respondents' favor on all claims. As an initial matter, the district court rejected Carpenter's argument that *Atlantic Research* precludes a party from bringing a § 107(a) claim to recover costs that it incurs pursuant to a settlement agreement. It noted that this Court "specifically left undecided" the question "whether costs of response which are compelled,

but not reimbursement, are recoverable under § 113(f) or § 107(a), or both." *Id.* at 135a. And it concluded that respondents Cytec, Ford, and SPS (and TI limited to the OU-2 work) could bring both § 107(a) and § 113(f) claims, while Agere and TI could bring § 107(a) claims. *Id.* at 134a-137a.

The court determined that, in light of Carpenter's proportionate responsibility for the waste at the Site, actual knowledge of DCC's polluting practices, and failure to cooperate with EPA, Carpenter's equitable share of the costs of cleanup (and reimbursement of EPA's costs) should be set at 80%. *Id.* at 150a-155a. One predicate of this holding was the district court's finding that Carpenter's volumetric share was 62.60% of the total waste; although other record evidence was available, *see* p. 7, *supra*, the court's opinion cited only the June 23 stipulation as the basis for this finding. *Id.* at 51a.

5. In a unanimous opinion, the Third Circuit vacated the district court's judgment and remanded for further proceedings. *Id.* at 7a.

a. The court first held that Agere and TI could bring § 107(a) cost recovery claims for sums paid pursuant to private settlement agreements with the other respondents. Section 107(a) authorizes a private party to recover costs it has "incurred," and the court reasoned that Agere and TI incurred cleanup costs "in the ordinary sense that a bill one obligates oneself to pay comes due as a job gets done." *Id.* at 38a-39. Moreover, the court noted that *Atlantic Research*'s discussion of settlement agreements "w[as] not made in the context of payments made for ongoing work." *Id.* at 39a.

The court also noted the anomalous consequences of Carpenter's position: Carpenter maintains that Agere and TI have no § 107(a) claims, and yet "Agere and TI do not have § 113(f) contribution claims for the settlement sums because those parties were never themselves sued for those amounts by the EPA or by other PRPs." *Id.* Thus, under Carpenter's theory, Agere and TI "would be completely barred from recovering ... under CERCLA." *Id.*

"To accept that outcome," the court added, "one must imagine that Congress intended to penalize cooperative cleanup efforts by excluding from CERCLA's broad recovery provisions all PRPs who, like Agere and TI, agree to come forward and assist in a cleanup even though they have not been subjected to a cost recovery suit." But "[s]uch an intent is extremely unlikely, since the goal of CERCLA is 'to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.'" *Id.* at 40a-41a (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994)).

Indeed, the court explained, "[w]hen a company in the position of Agere and TI has not yet been sued by the EPA but appreciates that it bears some responsibility for cleaning up hazardous waste, the language of CERCLA, which is intended to encourage cleanup, ought not to be interpreted to discourage participation in cleanup if a more consistent construction of the statute is plausible." *Id.* at 40a. That is because "[p]rivate actors are not likely to settle and step forward unless they know that they can seek some of the amounts they will contribute, just

like ... those who have been sued by the EPA or a PRP, or those who voluntarily clean up a site in the first instance." *Id.*

At the same time, the court held that in the circumstances of this case, respondents Cytec, Ford, and SPS (and TI with respect to the OU-2 work) should not be allowed to bring § 107(a) claims alongside their § 113(f) claims. The court did not dispute that these respondents "incurred" costs. It precluded their § 107(a) claims on the theory that a party should not be allowed to pursue both causes of action, and because these particular § 107(a) claims would not have been subject to Carpenter's counterclaim for equitable distribution. *See id.* at 45a (noting that § 113(f)(2), 42 U.S.C. § 9613(f)(2), precludes "claims for contribution" against PRPs that settle with EPA).

b. Together these holdings ensured that each of the respondents could seek compensation or reimbursement. But the Third Circuit then held that the district court abused its discretion in resolving those claims and in establishing an equitable distribution of costs. It reasoned that the district court should not have relied on the June 23 stipulation to determine Carpenter's volumetric share of the total waste, because Carpenter could not be treated as having joined it. *Id.* at 52a. And because the district court's opinion "appear[ed]" to rely exclusively on the June 23 stipulation as the basis for that finding, *id.* at 51a, its volume allocation "constitutes an abuse of discretion and cannot stand," *id.* at 56a.

The court of appeals acknowledged, however, that "[w]hile the stipulations are inadmissible ..., there

may well be other evidence of record that could be dispositive as to [respondents'] and H&H's waste volumes." *Id.* at 56a. It therefore remanded to the district court, "which is far more familiar" with that potential evidence. *Id.* at 57a. And it observed that the district court "may also decide that, in the unusual circumstances of this case, the record will need to be reopened to consider the equitable allocation again, and, in that context, it may review any admissible evidence as to the [respondents'] and H&H's waste volumes." *Id.*

6. Carpenter filed a petition for rehearing, arguing only that the Third Circuit erred in remanding the case because respondents failed to "meet their burden of proof." Pet. for Reh'g En Banc, 2010 U.S. 3rd Cir. Briefs LEXIS 1, *1-*3 (Apr. 26, 2010). It did not argue that the panel's decision was inconsistent with *Atlantic Research*. The Third Circuit denied rehearing, with no judge dissenting from the denial.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION ALLOWING AGERE AND TI TO MAINTAIN COST RECOVERY CLAIMS DOES NOT WARRANT REVIEW

In its 57-page opinion, the Third Circuit held that Agere and TI were entitled to pursue § 107(a) cost recovery claims. This holding adheres to CERCLA's plain text and statutory purposes, is consistent with this Court's precedents, is not in conflict with any other lower court decision, and is presented to this Court in an interlocutory posture. This Court's review is unwarranted.

1. The petition fails to identify any conflict between the Third Circuit's decision and the decision of any other court of appeals. In fact, the petition fails to cite any other lower court opinion that so much as considers the issue presented here. Given the lack of a circuit split—and the lack of a developed body of lower court decisions to inform this Court's review—further percolation in the lower courts is advisable.

That is especially so here, because the petition is interlocutory: the Third Circuit vacated the district court's judgment in favor of respondents and remanded for further proceedings. And where a "Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

2. a. In any event, the petition should be denied because the Third Circuit's holding is correct. Agere and TI have shouldered a portion of the costs of ongoing remediation work at the Boarhead Site, and thus have "incurred" costs in any ordinary sense of the word. *See* Pet. App. 38a-39a. Because § 107(a) authorizes a party to bring suit to recover "incurred" costs, CERCLA's text supports Agere's and TI's pursuit of § 107(a) claims. And the fact that respondents incurred these costs pursuant to a private settlement agreement does not alter the fact that they are "incurring" costs. *Accord W.R. Grace & Co.-*

Conn. v. Zotos, Int'l, Inc., 559 F.3d 85, 90-91 (2d Cir. 2009) ("Under the plain language of the statute, the fact that a party enters into a consent order before beginning remediation is of no legal significance with respect to whether or not the party has incurred response costs as required under section 107(a)").

b. Carpenter maintains, however, that this Court's decision in *Atlantic Research* carved an exception to the ordinary meaning of the word "incurred" for any costs borne as a consequence of a consent decree or settlement agreement. According to Carpenter, *Atlantic Research* "defined what the term 'incurred' means for purposes of § 107(a), drawing a clear distinction between costs of performance, on the one hand, and amounts paid in settlement, on the other." Pet. 8.

There are two obvious flaws in Carpenter's argument. First, Carpenter's categorical distinction between "costs of performance" and "amounts paid in settlement" finds scant support in *Atlantic Research*. Carpenter relies on the Court's statement that when "a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response," but rather "reimburses other parties for costs that those parties incurred." 551 U.S. at 139. But in the very next paragraph of the opinion, the Court clarified what it meant: a party who merely "reimburs[es] response costs paid by other parties" would not have "incurred its own costs of response and therefore cannot recover under § 107(a)." *Id.* That is, the Court merely recognized that *if* a party does not incur its own costs, but simply pays another

party to satisfy a settlement agreement by which it reimburses that other party's costs, *then* § 107(a) would be unavailable.

The court, however, did not suggest that a party by nature could never incur costs pursuant to a settlement agreement. To the contrary, the Court explicitly recognized that there might be situations in which "a PRP does not incur costs voluntarily but does not reimburse the costs of another party." 551 U.S. at 139 n.6.[5] And the court declined to "decide whether these compelled costs of response are recoverable under § 113(f), § 107(a), or both." *Id.*[6]

Second, Carpenter's strained interpretation of *Atlantic Research* would undermine CERCLA's statutory purposes and produce anomalous results. As the court of appeals explained, if "Agere and TI cannot pursue § 107(a) claims for their settlement payments, they would be completely barred from recovering those amounts under CERCLA," because neither has been sued by EPA or another PRP, precluding recovery under § 113(f). Pet. App. 39a. Carpen-

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[5] For instance, when parties in a PRP group are collecting funds in advance to pay projected costs, the PRPs are paying for costs that have not yet been incurred. These payments cannot be reimbursements because the parties have yet to incur costs that could be reimbursed.

[6] Furthermore, Carpenter's reliance on *Atlantic Research* fails not only legally but also factually. Agere and TI entered into *agreements* with the other respondents. *See* Pet. App. 76a-77a. But no district court finding or evidence in the record supports the assertion that Agere and TI entered into *settlement* agreements. They did not settle any lawsuit—they had not been sued. *See id.* at 39.

ter's interpretation thus would "penalize cooperative cleanup efforts by excluding from CERCLA's broad recovery provisions all PRPs who, like Agere and TI, agree to come forward and assist in a cleanup even though they have not been subjected to a cost recovery suit." *Id.* at 39a-40a.

To be sure, Carpenter insists its position would not leave PRPs like Agere and TI without a remedy. Pet. 11. But what it proposes is far from reassuring. Carpenter speculates that Agere and TI could simply "settle with EPA," *id.*, though it nowhere explains how private parties could completely control EPA's litigation decisions. Carpenter next suggests that if a PRP does not get sued by EPA (and therefore has no opportunity to settle), it should simply refrain from offering any cleanup assistance, and instead should offer no more than its proportionate share to the PRPs that have settled with EPA. But CERCLA's purposes would be stifled by Carpenter's envisioned regime—in which a PRP would be pressed to offer *less* cleanup assistance than it is inclined to do.

Carpenter also argues that its interpretation of the word "incurred" would promote CERCLA's statutory purposes in other ways. Carpenter suggests that if PRPs like Agere and TI—who have voluntarily accepted their responsibility for cleanup costs—are allowed to pursue § 107(a) claims, they will have less incentive to settle with EPA. *Id.* at 12. Carpenter is poorly positioned to make that argument in light of its steadfast refusal to cooperate with EPA. Carpenter, in any event, is wrong: nothing in the court of appeals' holding would discourage Agere and TI from settling with EPA if they were ever sued.

c. Finally, § 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), offers no support to Carpenter's petition. Carpenter interprets § 122(e)(6) as providing that only parties to an EPA consent decree have the "right or ability to perform the cleanup under CERCLA." Pet. 10-11. Because Agere and TI are not parties to an EPA consent decree, Carpenter argues, they cannot properly "incur" cleanup costs at the Site.

Carpenter misreads the provision. Section 122(e)(6) provides that "no potentially responsible party may undertake any remedial action" unless "such remedial action has been authorized by the President," but it *does not* say that the President, having authorized remedial actions, must also specify particular parties authorized to perform the remedial actions. Unsurprisingly, Carpenter identifies no support for its contrary argument.

For all of those reasons, review of the CERCLA § 107(a) question should be denied.

II. THE THIRD CIRCUIT'S REMAND FOR FURTHER PROCEEDINGS DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner asserts that the Third Circuit's remand violated "well-established principles of appellate procedure," namely, that "a plaintiff is not entitled to a remand to reopen the record following an appellate court's determination that the plaintiff failed to satisfy its burden of proof at trial, unless some 'special circumstance' exists that would make entry of judgment for the defendant unfair." Pet. 18-19. That factbound claim does not warrant review.

1. As an initial matter, Carpenter inaccurately frames the issue. According to Carpenter, the court of appeals conclusively found that respondents failed to offer any admissible evidence on the volume allocation issue. But the court of appeals found no such thing. While it found that the district court relied exclusively upon inadmissible evidence *in its opinion*, it did not find that there was no admissible evidence on volume allocation issues *in the record*, or even that respondents failed to offer any probative evidence in their case-in-chief. To the contrary, the court expressly reserved those questions for the district court to consider on remand. *See* Pet App. 56a ("While the stipulations are inadmissible unless a hearsay exception applies, there may well be other evidence of record that could be dispositive as to [respondents'] and H&H's waste volumes."). Indeed, a key reason for the court of appeals' remand was that the district court would be in a better position to sift through the factual evidence to make that assessment. *Id.* at 57a.

2. Even if the petition's framing of the question were accurate, it would not warrant this Court's review.

To begin with, Carpenter's argument misstates the legal standard. Although Carpenter argues that the Third Circuit's remand would be permissible only upon a finding of "some 'special circumstance,'" Pet. 19, it offers no citation for that phrase, and it is in fact well-settled that courts of appeals have broad discretion to decide that a remand is appropriate, even after concluding that a plaintiff's evidence is insufficient. *See Weisgram v. Marley Co.*, 528 U.S.

440, 454, 456 (2000) (courts of appeals should exercise "informed discretion" in deciding whether to direct entry of judgment or instead "return[] the case to the District Court for further proceedings").[7] Moreover, it is plainly appropriate to allow a district court on remand to reopen the record. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 551 (1983) ("On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court.").

In any event, Carpenter's argument fails on its own terms. Even if a court of appeals were always required to identify some "special circumstance" before remanding for further proceedings, the Third Circuit's remand would still be appropriate because the court expressly found that this case posed "unusual circumstances." Pet. App. 57a. To be sure, Carpenter takes issue with that determination, *see, e.g.*, Pet. 22-23, but its factbound disagreement with the court of appeals' conclusion does not merit review.

The factbound nature of the petition is underscored by the fact that Carpenter does not, and cannot, assert that the court of appeals' remand implicates any conflict in the lower courts. Although Carpenter cites cases in which a remand was not granted (including a Third Circuit precedent), *see* Pet. 20-25, those outcomes merely reflect the exer-

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[7] *See also* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction ... may remand the cause and ... require such further proceedings to be had as may be just under the circumstances.").

cise of discretion in the particular circumstances of those cases.

Review is even less warranted in this case, because the proceedings on remand may well obviate the need to reopen the record. For instance, the district court could conclude that the evidence already in the record suffices to reaffirm its earlier factual findings and equitable distribution of costs (an outcome the Third Circuit strongly indicated would be appropriate, *see* Pet. App. 56a-57a).[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] Petitioner argues that respondents "waived" the option of a remand. Pet. 25-30. The court's option to remand in its discretion is not "waivable" by a party, and any factbound question concerning waiver in any event would not warrant review.